SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-587

OTIS R. BOWEN, as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;
THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA;
THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

and

DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

# Supreme Court of the United States

October Term, 1974

No.

OTIS R. BOWEN, as Governor of the State of Indiana;
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HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;
THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA;
THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

and

DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Otis R. Bowen, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, Harold H. Negley, as Superintendent

of Public Instruction of the State of Indiana, the Indiana State Board of Education, a public corporate body, the Metropolitan School District of Decatur Township, Marion County, Indiana, the Franklin Township Community School Corporation, Marion County, Indiana, the Metropolitan School District of Pike Township, Marion County, Indiana, and the Metropolitan School District of Washington Township, Marion County, Indiana, respectfully pray that this Court issue a writ of certiorari to review and reverse, in part, the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the consolidated cause, numbers 73-1968 through 73-1984, on August 21, 1974, reversing in part, affirming in part and remanding said cause to the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court).

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported. A copy of said opinion may be found at pages A-2 through A-33 of the Joint Appendix. The opinions of the District Court are reported at 368 F. Supp. 1191 (S.D. Ind., 1973), and said opinions are appended at pages A-35 through A-103 of the Joint Appendix.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1) and Rule 19 (1) (b) of the Rules of this Court, to review a decision of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), which has decided a federal question in conflict with applicable decisions of this court, and to call

for the exercise of this Court's supervisory powers over inferior Federal courts.

The opinion of the Seventh Circuit was entered on August 21, 1974.[1] This petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. Sec. 2101 (c).

## QUESTIONS PRESENTED FOR REVIEW

The Petitioners present the following questions for review by this Court:

1. Whether the Seventh Circuit erred in remanding this cause to the District Court for further proceedings regarding the appropriateness of a metropolitan remedy within the "Uni-Gov" boundaries of the City of Indianap-

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1. The parties in the Seventh Circuit who are considered respondents herein are: United States of America; Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein; The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as Superintendent of Schools; Erle A. Kightlinger, as President of the Board of School Commissioners; Jessie Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, Members of the Board of School Commissioners of the City of Indianapolis; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Greenwood Community School Corporation, Johnson County, Indiana; Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corporation, Hancock County, Indiana; Greenfield Community School Corporation, Hancock County, Indiana; Mooresville Consolidated School Corporation, Morgan County, Indiana; Plainfield Community School Corporation, Hendricks County, Indiana; Avon Community School Corporation, Hendricks County, Indiana; Brownsburg Community School Corporation, Hendricks County, Indiana; Eagle-Union Community School Corporation, Boone County, Indiana; Citizens for Quality Schools, Inc.; Coalition for Integrated Education; Hamilton Southeastern Schools, Hamilton County, Indiana; Center Grove Community School Corporation, Johnson County, Indiana; Clark-Pleasant Community School Corporation, Johnson County, Indiana; Southern Hancock County Community School Corporation, Hancock County, Indiana; Northwestern Consolidated School District, Shelby County, Indiana.

olis, Marion County, Indiana, consistent with *Milliken v. Bradley*, 94 S.Ct. 3112, (July 25, 1974), when there was already a finding by the District Court that none of the separate and independent school districts within Marion County, Indiana, other than the Indianapolis Public Schools, was guilty of *de jure* segregation, and when the racial composition of the IPS system was 59% white and 41% black.

2. Whether the Seventh Circuit erred in affirming the District Court's imputation of liability of IPS to the State Defendants, who were never parties to the proceedings in which that liability was established, and who were denied due process of law in that they were denied the opportunity in the District Court to contest the original findings.

3. Whether the Seventh Circuit erred in holding that the Petitioners had not been denied due process of law in the district court.

4. Whether this Court should exercise its supervisory power over inferior Federal courts to compel certain evidence to be considered by those Courts, if there is to be a new trial involving these Petitioners.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon are the Fifth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. § 2000c-6(a) and IC 1971, 18-4-3-14 as found in Burns' Ind. Stat. Ann. § 48-9213, all of which are appended in the Joint Appendix at pages A-210, A-213, and A-221 respectively.

## STATEMENT OF THE CASE

### I.

### The Case in the District Court

#### A.

#### "Indianapolis I[2]"

This petition arises from an opinion issued on August 21, 1974 by the Seventh Circuit affirming in part, reversing in part and remanding a school desegregation case to the District Court for further proceedings.

The original Indianapolis lawsuit was commenced on May 31, 1968 when the United States of America filed a Complaint in the United States District Court for the Southern District of Indiana, Indianapolis Division, which was assigned cause number IP-68-C-225. The action by the United States was brought pursuant to 42 U.S.C. § 2000c-6(a) and (b), and was tried by the Court on July 12-21, 1971. Defendants in the aforementioned complaint were The Board of School Commissioners of the City of Indianapolis, Indiana, its Superintendent of Schools, and members of its Board.

On August 18, 1971, the District Court issued its "Memorandum of Decision" holding that IPS was guilty of *de jure* segregation. The Court permanently enjoined defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them from "discriminating on the basis of race in

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2. The District Court has characterized its various decisions in this matter as follows: Indianapolis I is 332 F. Supp. 655 (S. D. Ind., 1971); Indianapolis II is 368 F. Supp. 1191 (S. D. Ind., 1973); Indianapolis III is 368 F. Supp. 1223 (S. D. Ind., 1973).

the operation of the Indianapolis School System," and further ordered the defendants to take seven steps to "fulfill their affirmative duty to achieve a nondiscriminatory school system." 332 F. Supp. 655, 680. In that regard the Court instructed the Plaintiff to bring in additional parties defendants to seek "such relief as the plaintiff seems justified," (332 F. Supp. 655, 680) including the possibility of the creation of a metropolitan school district for the area of IPS and the surrounding school districts.

The District Court's findings in that trial were that the IPS school board constructed three high school buildings in 1961, 1963, and 1967, the placement of which constituted acts of *de jure* segregation within IPS.

The petitioners herein were never parties to that proceeding, in any manner. They did not present any evidence or examine any witnesses. They did not receive any notice of the proceedings and did not participate in the appeal thereof.

On September 7, 1971, pursuant to the order of the District Court, the United States filed a "Motion to Add Parties Defendant" and an order was entered on the same date which made twelve (12) school corporations defendants in the previously concluded case as directed by the "Memorandum of Decision" issued by the Court as noted above. However, the United States requested no relief against any of those twelve school corporations, and no relief has since been demanded by the United States against those schools or any other added defendants, among which are the Petitioners herein.

On September 10, 1971, the original defendants filed their Notice of Appeal to the Seventh Circuit from the final judgment entered on August 18, 1971.

## B.

## "Indianapolis II"

On September 14, 1971, a "Motion to Intervene as Party Plaintiff" was filed by Donny Brurell Buckley and Alycia Marquese Buckley who purported to intervene as representatives of a class comprised of Negro school age children in Marion County, Indiana. With that motion a "Complaint in Intervention" was filed, using the same cause number as the previously concluded case, which named the board of School Commissioners of the City of Indianapolis, et al., as defendants, and named John J. Loughlin, as Superintendent of Public Instruction of the State of Indiana, and nineteen school districts as added defendants. The "Complaint in Intervention" was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and the Fourteenth Amendment to the Constitution of the United States.

On October 21, 1971, an Amended Complaint was filed by intervening plaintiffs which named Edgar D. Whitcomb, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, and The Indiana State Board of Education, a public corporate body, as added defendants. It sought relief pursuant 42 U.S.C. §§ 1983 and 1988, 28 U.S.C. §§ 1343(3), 2201 and 2202, and the Fourteenth Amendment to the Constitution of the United States. Joint Appendix p. A-149.

The petitioners and other added defendants filed motions with the District Court asking, in the new trial involving them, that they not be bound by the findings and evidence of the preceding trial and judgment.

In its Entry of December 30, 1971, the District Court stated:

> The Court recognizes that the main thrust of the added defendants' various motions to dismiss the

> intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. *This position is valid.* Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the Court entered before joinder of the added defendants. Joint Appendix p. A-135. (Emphasis supplied.)

In its Entry of February 2, 1973 the District Court set a trial date and stated:

> . . . The trial will be limited to the issues formed on the amended complaint of the intervening plaintiffs, . . . and the answers thereto. Joint Appendix A-118.

In a "Pre-trial Conference" the day before the commencement of the trial in the new action, the District Court reversed itself and held that its findings in the first trial were *res judicata* in the second trial; hence the findings against IPS stood as before. See page A-116 in the Joint Appendix.

Trial of the new action occurred before the District Court on June 12, 1973 through July 6, 1973, and those proceedings were reopened by the Court on its own motion on July 18, 1973. In that trial the parties were as follows:

1.

**Indianapolis Public School System Marion County, Indiana**

The IPS system is one of eleven (11) in Marion County, Indiana, and is the twenty-ninth largest in the United States. In its 1972-1973 enrollment the IPS system had 97,833 students with a *racial composition of 59 percent white and 41 percent black.* In the former litigation it was found to be a *de jure* segregated school system. Joint Appendix A-157.

2.

**State Officials in Indiana**

In the second trial the intervening plaintiffs added the Governor, the Attorney General, the Indiana State Board of Education, and the Superintendent of Public Instruction as added defendants. Findings were entered against only the latter two parties, and those findings were that the findings against IPS in the first trial, i.e., that the placement of three high schools constructed in 1961, 1963, and 1967, constituted acts of *de jure* segregation, were "imputed" to the state officials because there was in the State Board of Education a power to review and approve site selections for purposes of insuring minimum health and safety standards. The District Court also found the State officials guilty of "other acts and omissions tending to inhibit desegregation." These were the only findings against any State officials in Indiana. 368 F.Supp. at 1203, Joint Appendix A-54.

3.

**Additional School Districts Within Marion County, Indiana**

There are ten (10) school systems located in Marion County, Indiana, in addition to IPS. Of those, eight (8) are township schools and two are school systems for the City of Beech Grove, Indi-

ana and the Town of Speedway, Indiana. Their combined enrollment in 1972-73 was approximately 77,611 school children. These school systems have never been illegally segregated nor have they ever operated dual school systems, and the District Court so found. 368 F. Supp. 1203, Joint Appendix A-54, 55.

**4.**

**Additional School Districts Outside Marion County, Indiana**

Also included were ten (10) school districts located outside Marion County, Indiana, in six (6) other counties, which were never a part of any Marion County school system, and which, in several instances, have existed since before the Civil War. Their combined 1972-73 enrollment was approximately 27,131 school children. These schools have never been segregated nor have they ever operated dual school systems, and the District Court so found. 368 F. Supp. 1203, Joint Appendix A-54, 55.

The District Court entered orders against all but one of the added defendant school districts even though it found that they were not illegally segregated school systems. 368 F. Supp. 1208-1210, Joint Appendix A-65-70.

Two days after the District Court reopened the proceedings and took evidence, it issued its "Memorandum of Decision." In that Decision the Court found acts of *de jure* segregation on the part of the Indianapolis Public Schools, and that those acts were "imputed" to the Indiana State Board of Education and the State Superintendent of Public Instruction. However, the Court found that there were no *de jure* acts of segregation attributable to any of the added defendant school districts. The District Court also found that the desegregation of the Indianapolis Public School System could not be *permanently*

*accomplished* within its own boundaries, primarily because of the possibility of resegregation "within a matter of two or three years." 368 F. Supp. at 1198, Joint Appendix A-43, 44.

The District Court did state that it could desegregate IPS within its own boundaries:

> "In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifiable as a black school . . ." 368 F. Supp. at 1198, Joint Appendix A-43.

Therefore, contrary to *Green v. County School Board of New Kent County, Virginia,* 391 U.S. 430 (1968) and *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), the District Court was not looking for a plan that promised realistically to work *now,* but one that promised to work it believed, for all time. Compare *Swann, supra,* at pages 31 and 32.

Notices of appeal to the Seventh Circuit were filed by the original defendants and all added defendants by August 16, 1973, and on September 18, 1973, the United States filed its notice of appeal.

## II.

### The Case in the Seventh Circuit

The Seventh Circuit heard oral argument on February 20, 1974, and issued its decision on August 21, 1974 affirming the District Court's holding that:

> ". . . the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the opera-

> tion of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries (see Part IV hereof)." (Joint Appendix, A-19.)

Further, the Seventh Circuit reversed the District Court's rulings relating to a metropolitan remedy beyond Marion County, Indiana. It remanded the case to the District Court for further proceedings regarding a multi-district remedy within Marion County, Indiana, which includes eleven (11) separate and independent school corporations. The Seventh Circuit also held that the addition of the added defendants to the second lawsuit (after the Indianapolis I case was already on appeal), and binding those added defendants to the findings of Indianapolis I, was not a denial of due process.

## III.

## Other Facts Material to Consideration of Questions Presented

### A.

### The Default Question

On August 27, 1973, the District Court held that the IPS Board of School Commissioners was in default in its obligation to develop adequate desegregation plans for the schools in its district. Joint Appendix A-104. The Seventh Circuit concluded in its opinion of August 21, 1974, that the District Court acted properly in holding the IPS board in default. Joint Appendix, A-15. Therefore, under *Swann*, there was no obligation on the part of any State official or agency to come forward with any desegregation plans until the time that IPS was declared to be in default and refused to proceed. But IPS has never refused to desegregate its system.

B.

**Uni-Gov Statute**

In 1969 several of the functions of the civil governments of the City of Indianapolis and of Marion County were consolidated into a unified government by the "Uni-Gov Act," IC 1971, 18-4-1-1, *et seq.* Burns' Ind. Stat. Ann. §48-9101 *et seq.* The functions of police and fire protection have not been consolidated. IC 1971, 18-4-12-6 and 7, Burns' Ind. Stat. Ann. § 48-9406 and 9407; IC 1971, 18-4-12-35, Burns' Ind. Stat. Ann. § 48-9442. The governmental functions of airport authority and board; health and hospital corporation and board; county department of welfare and board; county home board; building authority, board of trustees and board of directors; capital improvements board of managers; housing authority; library districts and boards; and school corporations, were not consolidated into one system. See IC 1971, 18-4-3-14, Burns' Ind. Stat. Ann. § 48-9213. Joint Appendix, A-250. The public school systems in Marion County, Indiana have never been a part of the civil government, and were thus omitted from the Uni-Gov statute.

## REASONS FOR ALLOWANCE OF THE WRIT

I.

**The Seventh Circuit Erred in Remanding This Cause for Further Proceedings Regarding The Appropriateness of a Multi-District Remedy When There Was Already a Finding by the District Court That None of the Separate and Independent School Districts Within the Area Sought to be Reconsidered Were Guilty of De Jure Segregation**

In *Swann, supra,* this Court clearly established the power of a district court in a school desegregation case, stating at page 16:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation.*
>
> . . . As with any equity case, *the nature of the violation determines the scope of the remedy.* . . . (Emphasis supplied.)

This Court emphatically reaffirmed that principle in *Milliken v. Bradley, supra,* stating at page 3127:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation."

In *Milliken* this Court reversed the Sixth Circuit's metropolitan rulings since the only *de jure* segregation violations found to exist were in the Detroit school district. Thus, the metropolitan remedy visited upon 53 other separate and independent school districts was found to be entirely improper since there were no *de jure* violations by those school districts.

The District Court in this case modeled its "Indianapolis II" decision after the Sixth Circuit's opinion which this Court subsequently reversed. But there was one critical factual distinction: here, the District Court found as a fact that none of the added school systems was segregated systems. Hence, unlike *Milliken,* the finding of no *de jure* segregation in the added school districts was made, and that finding was not contested by any party on appeal in the Seventh Circuit. That finding was respected by the Seventh Circuit in that it reversed the District Court as to all school districts outside Marion County, Indiana, other than IPS. However, the Seventh Circuit *ignored* that finding in regard to the School Districts inside Marion County, Indiana, other than IPS.

In that respect the Seventh Circuit erred. The finding of no *de jure* segregation is one which limits the judicial power of the District Court, under this Court's decisions. That is precisely the effect which that finding also has on the Court of Appeals.

Additionally, in "Indianapolis II" the District Court again found IPS guilty of *de jure* segregation in the site selection and construction of three high schools in 1961, 1963, and 1967, although the District Court refused to allow any of the parties, and especially IPS and the State Defendants, the opportunity to litigate or present evidence on that question. The District Court then "imputed" those findings to the State Defendants, thus to construct, in its mind, a constitutional platform for the extension of its remedial powers to all parties who exist pursuant to state law, namely the State Defendants and all other available defendant school systems in the metropolitan area of Indianapolis, Indiana. Such was this case as it went to the Seventh Circuit. After this Court's decision in ***Milliken v. Bradley, supra*** the Seventh Circuit issued its opinion in the case at bar.

The Seventh Circuit affirmed the finding that IPS was guilty of *de jure* segregation, which no party contested on appeal and it also affirmed that the State defendants were guilty of "various acts and omissions" which promoted segregation and inhibited desegregation, although that Court, like the District Court, never disclosed what those acts were, and that Court, unlike the District Court, made no mention of the school site approvals.

The Seventh Circuit affirmed the findings that there was no *de jure* segregation on the part of the school districts outside Marion County, Indiana, and as to those school corporations, the Court of Appeals reversed the District Court.

The Seventh Circuit then ignored the finding that there was no *de jure* segregation in the school district defendants inside Marion County, Indiana, except IPS, and remanded the case because of a civil government statute entitled "Uni-Gov". Upon remand the ultimate legal question would apparently be whether the Marion County school systems were segregated school systems, a question which already has been answered in the negative by the District Court in "Indianapolis II."

However, the Petitioners would emphatically assert that the finding that all added school district defendants were innocent of *de jure* segregation is controlling in this case, regardless of the outcome of the proceedings for which a remand was ordered.

The Seventh Circuit did not disclose why it was necessary to reconsider the Uni-Gov issue. Petitioners can only conclude that the Seventh Circuit, by permitting the District Court to contemplate a Marion County-Wide remedy, has disregarded the meaning of the findings in the trial court and the significance of this Court's decisions in *Milliken v. Bradley, supra,* and *Swann v. Board of Education, supra.*

The petitioners pray that the writ be granted, that the Court of Appeals be reversed because its decision is contrary to this Court's decisions in *Swann v. Board of Education,* 402 U.S. 1 (1971), and *Milliken v. Bradley,* 94 S. Ct. 3112 (1974), and that they be dismissed from further litigation in this proceeding.

## II.

## THE SEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT THAT THE STATE OFFICIALS HAVE BY VARIOUS ACTS AND OMISSIONS PROMOTED SEGREGATION AND INHIBITED DESEGREGATION WITHIN THE IPS SYSTEM

Part IV of the District Court's decision of July 20, 1973, is entitled "Responsibility of the State of Indiana." In that section the Court reasoned that since it had found in Indianapolis I that the placement of three high schools within IPS constituted acts of *de jure* segregation, and since "appropriate agencies" of the State Board of Education and the Superintendent of Public Instruction "approved" those sites, those approvals were acts of *de jure* segregation "on the part of officials of the State." 368 F. Supp. at 1203, Joint Appendix, A-54.

The District Court also found that:

> ". . . the failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation. 368 F. Supp. at 1203, Joint Appendix A-54.

These findings gave rise to Conclusions of Law numbers 1 and 2:

1. The acts of *de jure* segregation heretofore found to have been practiced by IPS can be, and are imputed to the State of Indiana.
2. The Superintendent of Public Instruction, the Indiana State Board of Education, and other responsible agents and agencies of the State of Indiana, and the State itself, have practiced de jure segregation, both by commission and by omission. (368 F. Supp. at 1205, Joint Appendix A-58.)

In *Milliken v. Bradley, supra,* this Court said at page 3127:

> ". . . Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial cause of inter-district segregation.* . . ." (Emphasis supplied.)

The issue of school site approvals was a key factor enabling the District Court in the *Milliken* case to find "state action" in Detroit as did the District Court in the case at bar. In *Milliken* this Court said at page 3130 that the:

> ". . . evidence was specifically limited to proof that school site acquisition and school construction within the city of Detroit produced de jure segregation within the city itself. Pet. App., at 144a-151a. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit."

In the Indianapolis case, the District Court found in Indianapolis I that the IPS Board of School commissioners was guilty of *de jure* segregation in constructing three high schools which were located in IPS, in 1961, 1963, and 1967. The District Court then refound that guilt and "imputed" that guilt to the State officials in Indianapolis II. 368 F. Supp. at 1205, Joint Appendix, A-54, 58.

At trial the evidence was massive that there was no causal connection between high school site selection in IPS and racial composition in the schools of Marion County, Indiana.

From the 1968 school year to May 7, 1973, the net increase in Negro students attending schools in the school corporations other than IPS in Marion County, Indiana, was 1,141 or 93.5%, while the net increase in white students attending those same schools was 5,070 or 7.31% (Tr. Exh. Lawrence Q and S). More telling is the fact that the net increase in Negro students attending those same schools from the 1971 school year (the year of the District Court's first decision in this case) to May 7, 1973, was 261, or 12.43%, while in the same period there was a net decrease in white students attending those same schools of minus 97 or minus 1.3%.

The undisputed evidence showed that Negroes moved to the Marion County School systems, including these petitioners, of their choice at a greater rate in number than whites. These facts were specifically disregarded by the District Court, and apparently were not considered by the Seventh Circuit, but those facts demonstrate why there was no causal connection between the three (3) school sites selected inside IPS and the racial composition of the other schools in Marion County, Indiana.

Those facts and findings show why the Seventh Circuit erred in disregarding this Court's decision in *Milliken*, and in permitting some further litigation in the District Court against all of these petitioners.

Further, the only finding by the District Court, affirmed in the Seventh Circuit against the State Defendants, was that they ". . . have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS . . ." But those findings were not specific, they offend Fed. R. Civ. P. 52, and the "acts" are not known to the state defendants.

Perhaps the District Court meant that the State Defendants were in fault when the District Court declared IPS to be in default of its obligation to desegregate on August 27, 1973, or almost two (2) full years after the litigation against the state defendants commenced. However, in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* this Court said that judicial authority enters only when local authority defaults. 402 U.S. at 16.

Thus, the State clearly could not have interposed itself into IPS prior to the declaration of default, or it would have been depriving the IPS Board of School Commissioners of its obligation to "proffer acceptable remedies," and the default did not occur until two (2) years after the litigation against the State Defendants had occurred.

In addition, neither the Plaintiff, the intervening Plaintiffs, the District Court nor the Seventh Circuit have advanced any statutory authority for the State of Indiana to interject itself into the school attendance patterns or affairs of any school district.

In short, there was no conceivable causal connection between the state defendants and the racial composition of any Marion County schools.

Accordingly, the writ should be granted, and that part of the Court of Appeals decision should be reversed.

## III

## THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE PETITIONERS HAD NOT BEEN DENIED DUE PROCESS OF LAW

Throughout this litigation the State Defendants have asserted that they have been denied due process of law by the District Court's holding that the findings of Indi-

anapolis I were *res judicata* in Indianapolis II. This argument is especially relevant now since IPS's guilt found in Indianapolis I was "imputed" to the State Defendants in Indianapolis II, but the Seventh Circuit made no specific findings against those Defendants.

In addition, the State Defendants and other Petitioners were brought into the litigation by intervening plaintiffs who also were not parties in Indianapolis I, (but who nevertheless benefited from its findings) after the original defendants had all filed notices of appeal to the Seventh Circuit.

The Seventh Circuit answered this argument by citing a previous order it had issued in this cause on August 10, 1973, wherein it cited *Plaquemines Parish Commission Council v. United States*, 416 F.2d 952, 954 (5th Cir., 1969), that: "The District Court did not *lose* jurisdiction of the *parties* merely because an appeal was pending . . ." (Emphasis supplied.) Thus, the Seventh Circuit missed the point that *neither* the Intervening Plaintiffs nor the Petitioners were *parties* to the original proceeding, nor could they have been pursuant to 42 U.S.C. § 2000c-6(a).

It is well established that such action on the part of the district Court constituted a denial of due process of law. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) and *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

## IV.

## THE DECISION BELOW CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER OVER INFERIOR FEDERAL COURTS, INVOLVING THE KIND OF EVIDENCE AND SOCIAL ANALYSIS WHICH A DEFENDANT SCHOOL BOARD CAN USE IN ATTEMPTING TO EFFECT A PUPIL-PLACEMENT PLAN IN A NON-SEGREGATED SCHOOL SYSTEM.

During the course of the trial the District Court excluded testimony by two of the added defendants' expert witnesses, Dr. David J. Armor and Dr. Ernest van den Haag. Dr. van den Haag appeared at the trial and his excluded testimony was adduced through an offer to prove. (Tr. 2229.) Dr. David Armor did not appear at the trial, but his testimony was offered through Speedway Exhibit No. M. (E. 120.) This Exhibit was a copy of Dr. Armor's publication in *The Public Interest* entitled "The Evidence of Busing." It was agreed among all parties and the District Court that if Dr. Armor would have testified at the trial his testimony would have been to the facts and conclusions stated in such article, that the court would have excluded any such testimony, and that the necessity of calling Dr. Armor as a witness was obviated by introduction of such Exhibit as an offer to prove. (Tr. 2200.)

The article by Dr. Armor was based upon statistical studies made of "induced" integration in Boston, Massachusetts, White Plains, New York, Ann Arbor, Michigan, Riverside, California, Hartford and New Haven, Connecticut, Evanston, Illinois, and other areas of the United States. "Induced" integration was defined by Dr. Armor as voluntary or mandatory integration brought about by governmental action. Dr. Armor evaluated the students involved in such programs with respect to their achieve-

ment, aspirations, self esteem, race relations and opportunities for higher education. With respect to these subjects, Dr. Armor's findings indicated that in many areas induced integration was counter-productive or that the students involved in the programs received little or no benefit. Dr. Armor concluded his findings by stating that mandatory busing programs could result in adverse sociological and psychological effects on the children involved in such programs, that prejudice, racial identity, solidarity and desire for separatism were usually enhanced rather than diminished, and that over the short run busing for purposes of integration did not lead to significant gains in student achievement or interracial harmony. In Dr. Armor's opinion, it was more desirable to stress natural integration brought about by individual choice. (Tr. Ex. Speedway M.)

Dr. van den Haag is a sociologist and psychologist. His testimony dealt with the sociological and psychological impact of integration or desegregation. In sum, his excluded testimony was to the effect that: (a) Contact between the races does not reduce prejudice; and (b) Integration (as distinguished from desegregation) may heighten racial identity and reduce the opportunity for actual contact between the races. (Tr. 2216-2269.)

In its opinion the District Court stated that it could "think of no more important form of special education for a Negro child than going to school in an integrated environment." Joint Appendix A-66. Since the District Court was considering whether a large scale white majority, metropolitan busing program should be implemented to effect this concept, it would only seem logical that the Court should have considered the impact which such a program might have upon the children who would be involved. The District Court, however, considered itself

precluded from receiving any such evidence even if it tended to prove that children involved in such a program might be harmed psychologically. (Tr. p. 1827.)

Additionally, the District Court stated at trial:

> "[T]he plaintiff's case, as I understand it, [is] on the subject of whether or not a stable or workable, *lasting system of desegregation* can be accomplished within the boundaries of the Indianapolis School System, which is certainly one of the key questions in this case * * *" (Tr. 2227). (Emphasis supplied.)

The Armor-van den Haag evidence was offered to assist in determining whether a court could effect the kind of plan which the District Court sought, and it was offered to reply to plaintiffs' extensive evidence on direct and cross-examination.

The issue as stated by the District Court was misconceived, and contrary to this Court's standards in *Swann v. Board of Education, supra,* at 31 and 32, in that a desegregation plan for all time to come is not the purpose of the remedy and it is not the duty of any school board defendant. No doubt the duty can never be that because no school board has the power which would be required to implement the District Court's concept and issue in this case.

The Seventh Circuit totally failed to understand the significance of the proffer, Jt. App. A-30. None of the school districts or state petitioners in this petition ever challenged the constitutional doctrine which was established in this Court's decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), and none of the school board petitioners have ever been in violation of that law, and the District Court so found.

The significance of the proffer is that there is no school board petitioner herein which is a segregated system, but

the District Court wanted a pupil-placement program for all of Marion County, Indiana, which it will call a "desegregation remedy", regardless of the consquences to the children involved.

The proffer of this evidence went to the question of whether such a program can be developed, assuming *arguendo* that the burden for doing so is attached to the defendants. This evidence would have presented powerful sociological and psychological facts which advise against the imposition of such a program.

That the program was the essence of the intervening plaintiffs case against the non-segregated school defendant petitioners, and by their rulings, the District Court and the Seventh Circuit failed to accept the proposition that in litigation each side is entitled to present evidence to the issues which evolve.

Fortunately, not every Court of Appeals judge has failed to understand that principle. In dissenting in *Bradley v. Milliken*, 484 F.2d 215, 270 (6th Cir., 1973), Judge Weick said:

> "The Supreme Court in Brown I relied heavily on testimony of sociolotists as to the adverse effect of segregation on the educational achievement of Negro children. It is inconceivable that the District Court would hold contrary testimony of a sociologist irrelevant and exclude it. This was prejudical error. *In a court of Justice not merely one side but both sides are entitled to offer evidence.*" (Emphasis supplied.)

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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